80-248

Supreme Court, U. S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1980

RUDOLF WOLFF & CO., LTD.,

Petitioner,

vs.

DAVID NEIMAN, d/b/a THE LONDON GROUP (1974),

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Where the evidence shows that an alien company designedly conducted business worth hundreds of millions of dollars by directly soliciting the business through its agents within Illinois, was the Seventh Circuit in error in determining that the alien company submitted itself to the jurisdiction of Illinois courts with respect to the transactions?

2. Is there a sufficient evidentiary basis to the Seventh Circuit's determination that the negotiations in a luncheon meeting between the alien company's agent and plaintiff, together with all the other factual circumstances, estab-

lished a sufficient jurisdictional foundation to overcome the constitutional objection raised by the alien company.

JURISDICTIONAL STATEMENT

The petitioner has accurately stated this Court's jurisdiction, the opinions below and the constitutional and statutory provision involved (Pet., pp. 1-2).

STATEMENT OF THE CASE

Nature of the Case and The Proceedings Below

The original complaint in this case was filed on July 20, 1975. The complaint named Rudolf Wloff & Co., Ltd. ("Wolff") as defendant and sought to specifically enforce agreements to purchase and deliver silver on the London Silver Market, and to obtain damages for breach of the agreements. The jurisdiction of the district court was invoked pursuant to 28 U.S.C. §1392. Jurisdiction over the person of the defendant was asserted pursuant to the Illinois Long Arm Statute, Ill. Rev. Stat., ch. 110, §17 (1977).

After the initial complaint was filed, Wolff moved to dismiss the complaint for lack of personal jurisdiction. Affidavits were filed by both parties. The district court, Judge Alfred C. Kirkland presiding, ruled that because the affidavits filed by both parties contained conflicting statements, the court was required to assume as true the facts related in the plaintiff's affidavit and complaint. Upon careful consideration, the court concluded that Neiman had successfully met the burden of showing *prima facie* that personal jurisdiction existed.

Plaintiff subsequently amended the initial complaint, adding James Gourlay ("Gourlay") and Ingleram Investments, Ltd. ("Ingleram") as defendants. The amended

complaint also delineated the grounds for asserting personal jurisdiction over the defendants, describing some of the material acts giving rise to the claims for relief which took place in the Northern District of Illinois, Eastern Division.

The amended complaint contained four claims for relief. The first claim alleged that Wolff was liable for breach of contract. The second claim alleged that Gourlay and Ingleram were liable for breach of warranty of authority or, alternatively, for breach of contract. The third claim for relief was against Wolff and Gourlay and was based on the doctrine of apparent authority or estoppel, alleging that the defendants were estopped to deny that Gourlay was a principal or agent of Wolff. The fourth claim for relief was for common law fraud, alleging that the defendants willfully, maliciously, and in bad faith conspired to deprive the plaintiff of the benefits of his contract with Wolff. (First Amended Complaint; App. 1-11).*

Wolff moved, pursuant to Rule 12(b)(2), Fed. R. Civ. Proc., to dismiss the amended complaint for lack of personal jurisdiction. (App. 14-16). The motion was supported by affidavits of Elliot Paskoff, Wolff's attorney, Francis Holford, Wolff's Secretary, defendant James Gourlay, and various documents and papers attesting essentially to the non-Illinois characteristics of the defendants and the instant transactions. (Appendix to Wolff Memorandum in support of its Motion to Dismiss with

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* References to "App." are to the Appendix filed in the Seventh Circuit. References to "Pet. App." are to the Appendix included with the Petition. References to "Resp. App." are to the Appendix in Respondent's Brief in this Court.

Affidavits; Supplement to Record on Appeal.) This motion was granted on March 16, 1978. In its Memorandum Opinion and Order, the district court held that Wolff did not have sufficient contacts with Illinois to establish personal jurisdiction. (Pet. App. A14-22)

Plaintiff then filed a motion for reconsideration of the order dismissing the cause as to Wolff. This motion was denied, with the district court adhering to its original opinion. Plaintiff initiated additional discovery. On the basis of newly discovered testimony, plaintiff filed a second motion for reconsideration. This motion was also denied by Memorandum Order (Pet. App. A23-25).

Wolff moved for a final judgment upon an express determination that there was no just reason for delay and upon an express direction for the entry of judgment. This motion was granted on April 30, 1979. Plaintiff filed a notice of appeal from this final judgment as to Wolff on May 25, 1979.

On June 27, 1979, the district court entered an order dismissing the cause as to defendants Gourlay and Ingleram for lack of personal jurisdiction. Plaintiff filed a notice of appeal from this order and judgment on July 12, 1979. The two appeals were thereafter consolidated.

The Seventh Circuit Court of Appeals, by unanimous decision delivered by Honorable Philip Tone prior to his retirement and appearing in the Petition, pp. A1-13, reversed the district court's determination as to personal jurisdiction over Wolff and Gourlay. A petition for rehearing *en banc* was denied. Wolff alone seeks certiorari here. Its petition to stay the issuance of the mandate was denied with the comment by the Court that "this case does not appear to us to be worthy of further review by certiorari." (Resp. App. 1a).

STATEMENT OF FACTS

Petitioner's account of the underlying facts in this case suffers from a selectivity which does not appropriately consider that any conflicts must be resolved in favor of the plaintiff on this jurisdictional motion. The effort to underplay the significance and extent of Wolff's contacts in Illinois cannot be sustained in light of the deposition testimony of Messrs. Persky, Lipschultz, Klein, Casselman, Richter, Neiman and others concerning the full extent of their dealings with Wolff and Gourlay, the tailor-made multi-million dollar agreement which was negotiated by Gourlay and Neiman in Chicago, the relationship of Gourlay, Wolff, Casselman and others in developing customer relations and transacting business, and the economical and commercial realities of the case.

The plaintiff, David Neiman ("Neiman"), d/b/a London Group (1974), is a citizen and resident of the United States, the State of Illinois and the City of Chicago. Wolff is a corporation incorporated under the laws of the United Kingdom. Wolff is a resident of London, England and of the State of New York. Wolff acts as a broker and principal in London metal transactions, including the purchase and sale of fine silver on the London Silver Market. Ingleram is a corporation incorporated under the law of the United Kingdom and is a resident of London, England. Ingleram acts as a consultant to investors interested in metal trading. Gourlay is a citizen of the United Kingdom and a resident of London, England. Gourlay is a former employee of Wolff, and is presently an employee of Ingleram. (First Amended Complaint, p. 2; App. 2) Gourlay is currently affiliated with

Wolff as a "one-half commission man." (Response of James Gourlay to Interrogatory 1 of Plaintiff's Second Set of Interrogatories; App. 22) Gourlay with the knowledge and authorization of Wolff, represented Wolff in the transactions which are the subject of this litigation. (App. 22).

In the summer of 1974, Neiman became interested in the use of silver trading as a tax shelter. In August or September of 1974, Neiman discussed silver trading with William E. Casselman, Sr., a broker with Stotler and Company of Chicago, Illinois. Casselman was previously employed (1969-1971) by Wolff in New York City. (Casselman dep., p. 9). While employed by Wolff/New York, Casselman worked closely with Wolff/London, and described Gourlay, who was at that time employed by Wolff/London, as his boss and old friend. (Casselman dep., p. 13.) In late 1973 or early 1974, Gourlay came to Chicago and made Casselman and two or three other brokers aware of the existence of cash and carry silver transactions as tax shelters. In the words of Casselman, Gourlay "obviously wanted somebody out hustling it. . . ." (Casselman dep., p. 36.) During 1974, Casselman handled in Illinois approximately twenty-five of these cash and carry deals, all through Wolff, all with the assistance of Gourlay. (*Id.*, p. 33)

Depositions of other brokers establish that these solicitations by Gourlay on behalf of Wolff began in 1969 and continued through 1975. (Persky, Lipschultz, Klein, Casselman and Richter depositions.) Gourlay, for and on behalf of Wolff and through the offices of Wolff, solicited, negotiated and ultimately effected agreements in Chicago, with Illinois residents, for the purchase and sale of silver and other commodities on the London market. *These*

transactions involved hundreds of millions of dollars. (Richter dep., p. 16).

In his discussions with Neiman, Casselman explained generally how silver trading worked (as explained to *him* by Gourlay), and said that the trading would be arranged through Wolff. Casselman arranged a luncheon meeting with Gourlay where the tax shelter aspects of the transactions could be discussed in detail, Neiman's questions would be answered, and a final agreement effected.

The luncheon meeting took place on October 14, 1974, at Binyon's Restaurant in Chicago, Illinois. The meeting was attended by Casselman, Gourlay and Neiman. At the meeting, and at all times thereafter, Gourlay was represented to Neiman as a senior management official of Wolff. The meeting lasted two to three hours, and Gourlay explained in detail the mechanics of the cash and carry transaction and its use as a tax shelter. Neiman asked numerous questions, and eventually Neiman and Gourlay agreed upon the terms of the trades which were made with Wolff. (Neiman dep., pp. 123-134).

The trades agreed to are known in the commodities markets as cash and carry trades. Neiman would place an order for the purchase of a specified amount of silver bullion for immediate delivery ("spot purchase"). At the time of the spot purchase, Wolff was to arrange for the sale of an equal amount of silver for future delivery approximately seven months later ("forward sale"), anticipating that the forward sale would qualify as a long-term capital gain to Neiman. The forward sale would be made at a slightly higher price than the spot purchase in order to cover carrying costs.

Neiman and Gourlay also agreed that the transactions were to be financed 100% by I. Rochester Finance, Ltd.

("Rochester"), a United Kingdom corporation which finances transactions in silver for Wolff's customers through a commercial bank in the United States. Rochester was to pay the purchase price of the silver directly to Wolff, the loan secured by the silver and due upon completion of the forward sale. *Neiman was thus responsible only for the interest charges on the loans.* These interest charges were in turn financed by a loan from the United States commercial bank to Neiman. Under the loan agreement, Neiman could pre-pay the Rochester loans on payment of a penalty. The price of the forward sale was calculated to offset the interest charges to Neiman, leaving Neiman out-of-pocket only for brokerage fees to Wolff. These fees were to be computed as a stated percentage of the difference in price between the spot purchase and the forward sale. (First Amended Complaint, pp. 3-4; App. 3-4).

In theory, these cash and carry transactions could have different results depending upon changes in the silver market. (a) If the transactions were consummated at maturity, Neiman's purchase and sale of the silver would result in an income tax deduction for interest paid, and an offsetting capital gain. Thus, Neiman's risk in the transaction was limited. (b) If the spread between spot purchase price and the forward sale price narrowed for reasons other than the passage of time, profits would be realized as the spot price and the cost of covering the forward contract normally do not rise at the same rate. (c) If the spread between the spot purchase price widens for reasons other than the passage of time, then the contracts are allowed to run to maturity with the attendant assumed results. (*Id.*, pp. 4-5; App. 4-5).

Pursuant to his agreement with Gourlay, Neiman, from Chicago, placed orders with Wolff for seven cash and

carry silver transactions. Wolff confirmed the transactions by mail to Neiman's Chicago business address. The transactions were executed on November 29, 1974, December 2, 1974, December 3, 1974, December 4, 1974, January 29, 1975 (two transactions) and March 18, 1975. (Id., p. 5; Exhibits A, B, C, D, E and F to the First Amended Complaint; App. 9-13).

Between November of 1974 and June of 1975, Neiman, in Chicago, was in close contact with Gourlay and Wolff in London. Neiman's communications with Gourlay by mail and by Telex were all addressed to Gourlay at Wolff's London office. Gourlay communicated with Neiman on stationery bearing Wolff's letterhead. On several occasions, Neiman telephoned Gourlay at the number shown on Wolff's letterhead, and was connected with Gourlay without incident or comment. At no time did Wolff or Gourlay give Neiman any indication that Gourlay was not an officer or management official of Wolff.

In March of 1975, the spread between the spot purchase price and the forward sale price of silver narrowed. Neiman, while in London on other business, met with Gourlay on March 26, 1975. The meeting took place at Wolff's London headquarters, where Gourlay had an office. There was nothing to indicate that Gourlay's office was not part of Wolff's business, and nothing to indicate that Gourlay's office had any connection with an entity called Ingleram. At this meeting, Neiman informed Gourlay that Wolff would shortly be instructed to sell the spot silver owned by Neiman and to follow Neiman's instructions with respect to covering his forward contracts. Neiman subsequently gave these instructions to Wolff. Wolff refused to follow Neiman's instructions, and confirmed their refusal by letter on April 10, 1975. Neiman repeated his instructions on April 11, 1975, and

Wolff again refused to follow them. (Id., p. 6; App. 6). Neiman then brought this action for specific performance and damages.

SUMMARY OF THE ARGUMENT

With only a passing nod at the relevant facts, petitioner Wolff seeks to create a constitutional question where there is none. The facts demonstrate that Wolff, through its agent Gourlay, fashioned a tax shelter from cash and carry silver transactions on the London Silver Market. Gourlay journeyed to the United States to interest brokers to "hustle" (in the language of one broker) the shelter transaction among American investors. Gourlay then followed up the broker's solicitations with personal visits with the investors in the United States where the deals were closed. Hundreds of millions of dollars in transactions resulted from his activities on behalf of Wolff.

One such series of deals were with the respondent Neiman. In an extended luncheon in Chicago between Gourlay, Neiman and Casselman (the broker), virtually all of the terms of the tailor-made transaction were settled, and the transactions were later consummated in seven cash and carry transactions with Wolff which were confined by Wolff by mail delivered to respondent Neiman's Chicago business address.

There is here no dramatic new pronouncement of a constitutional extension of "due process" as that doctrine relates to personal jurisdiction over alien corporations. This is simply a garden variety direct pervasive solicitation of business by Wolff physically within the United States with United States citizens. It is ridiculous to state that Wolff did not assume it would be subject to the laws of the States of his country where the deals were made.

ARGUMENT

I.

THERE IS NO CONSTITUTIONAL QUESTION WHATEVER, LET ALONE A QUESTION OF SUBSTANCE, RAISED IN THIS PETITION.

Wolff postulates its request that this Court accept this case on the theory that the Seventh Circuit's decision was an "unprecedented commingling or amalgamation of due process concepts of 'doing business' with those arising from 'a transaction of business'." This is sheer, unadulterated nonsense.

Examination of the decision reveals that the Court considered the general background of Wolff's dealings in the United States relative to "hustling" the tax shelters in order to place in context its "hustling" of Neiman by Gourlay through the broker Casselman. To suggest that its method of operation, as evidenced by other dealings, was irrelevant in the consideration of the Neiman deal is absurd.

A word should also be said about two other contentions. First, Wolff, the alien defendant, decries the injustice of its being "hauled into an American forum" to answer for its perfidy to an American citizen. (Pet., p. 12). We would state that no one begged Wolff to hustle its tax shelter, grounded in American tax law, in the United States among American citizens. Wolff, through Gourlay actively solicited hundreds of millions of dollars in contracts, including Neiman's, within this country. To suggest that it has not "purposely (availed) itself of the privilege of concluding activities within the forum State,

thus invoking the benefits and protections of its laws," is absurd. *Hanson* v. *Denckla,* 357 U.S. 235, 253 (1958).

Secondly, Wolff has the gall to state that Neiman "duped" it into trading the silver (Pet., p. 16). This is stated in the face of the allegation of its fraud in dealing with Neiman. There is considerable doubt whether Wolff ever completed the contract. The pervasiveness of Wolff's fraudulent conduct as indicated in the depositions filed in this case, and specifically in the transactions "hustled" in Illinois alone, render absurd Wolff's claim of being duped.

II.

THERE IS NO CONFLICT BETWEEN THE SEVENTH CIRCUIT'S DECISION AND BERSCH v. DREXEL FIRESTONE, INC., 519 F.2d 974 (2d Cir. 1975).

Petitioner suggests that the Seventh Circuit failed to credit properly the "cautious analysis" given by the Second Circuit to an alien's jurisdictional base, particularly in *Bersch* v. *Drexel Furniture, Inc.,* 519 F.2d 974 (2d Cir. 1975). Justice Tone, however, carefully distinguished *Bersch* in his opinion. (Pet. App. A12). As stated by the Court, "the purposeful objective of both Gourlay's earlier visit to Casselman and his luncheon meeting with Neiman" differentiate the instant facts from those in *Bersch.*

Careful deference was given *Bersch* and its progeny in the Court's refusal to accept respondent's contention that Wolff's pervasive business transactions, amounting to hundreds of millions in silver contracts, were insufficient to provide a separate jurisdictional basis in Wolff's "doing business" in Illinois.

III.

THE SEVENTH CIRCUIT EXPRESSLY CONSIDERED THE FACTOR OF "DISTANT OR INCONVENIENT FORUM".

Petitioner finally complains that the Seventh Circuit failed properly to consider the "burdens" of this sophisticated English trading company in defending this claim "in a distant or inconvenient forum." The simple answer to this contention is that the Seventh Circuit considered the factor of a convenient forum and concluded that "it would also be inconvenient for plaintiff to sue overseas. Given defendants' purposeful acts in Illinois, we do not find any inconvenience to amount to a denial of due process." (Pet., App. A 11, n. 8).

These is no indication that the Court failed to evaluate the various component considerations in the factor of convenience as alleged by petitioner. The unquestioned standing and prominence of the Opinion's author, Philip Tone, forecloses any suggestion that such factors were not considered. In fact, elsewhere in the Opinion he expressly commented on choice of law, the nature of the commercial transactions, the place of contemplated performance, and a disbelief that Wolff would not reasonably have expected that it would be required to defend itself in an American courtroom. The residence of witnesses and the location of relevant documents are not exclusively in England.

There is no merit whatever to petitioner's inconvenient forum contention.

CONCLUSION

There is no substantial reason, in fact no reason at all, for this Court to grant the writ of certiorari in this case. The Seventh Circuit was correct in determining that "this case does not appear to us to be worthy of further review by certiorari," in refusing a stay of the mandate.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

June 2, 1980

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge.*
Hon. .....
Hon. .....

Nos. 79-1622 & 79-1802

DAVID NEIMAN, d/b/a London Group (1974),
Plaintiff-Appellant,

vs.

RUDOLF WOLFF AND CO. LTD., INGLERAN INVESTMENTS, LTD., an English corporation, and JAMES GOURLAY,
Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 75-C-2531

Judge THOMAS R. MCMILLEN

This matter comes before the court for its consideration on the "MOTION" requesting this court to stay its mandate pending application for a writ of certiorari filed herein on May 29, 1980 by counsel for the defendant-appellee, Rudolph Wolff & Co. Ltd. On consideration thereof,

IT IS ORDERED that said motion is hereby DENIED. This court has already denied a petition for rehearing en banc. Judge Tone's April 23, 1980 order was correctly reasoned, and this case does not appear to us to be worthy of further review by certiorari.